STATE OF TENNESSEE

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December 6, 2002
*Via Overnight Delivery Mail*

Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

RE: **Do-Not-Call Comments to the Federal Communications Commission. CC Docket No. 02-278, CC Docket No. 92-90**

To Whom It May Concern:

Please find the enclosed Comments and Recommendations of the Tennessee Regulatory Authority and the Tennessee Attorney General regarding the above stated matter. We respectfully file these Comments in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission on September 18, 2002. To acknowledge receipt of this package, we have included an extra copy of the first page of our filing including postage and a self-addressed envelope to be stamped and returned to us by the Commission.

Should you or your staff have any questions regarding the documents contained herein, please do not hesitate to contact our Office directly at the number listed below. Thank you for your attention and cooperation in this regard.

Sincerely.



LEIGH ANN ROBERTS
Assistant Attorney General
(615) 532-9299

cc: Eileen Hamngton
Bureau of Consumer Protection
Division of Marketing Practices
Federal Trade Commission

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
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| **In the Matter of** | ) | |
| | ) | |
| **Rules and Regulations Implementing the** | ) | **CG Docket No. 02-278** |
| **Telephone Consumer Protection Act *of* 1991** | ) | **CC Docket No. 92-90** |

# COMMENTS AND RECOMMENDATIONS OF THE TENNESSEE REGULATORY AUTHORITY AND THE TENNESSEE ATTORNEY GENERAL

## I. Introduction and Summary

On September 18, 2002, the Federal Communications Commission issued a Notice of Proposed Rulemaking ("NPRM")[1] in order lo establish a national Do-No[-Call Registry. Both the Tennessee Attorney General's Office and the Tennessee Regulatory Authority have been monitoring this matter for several months. We believe the rules will have a significant impact on Tenncssce and many other states. Therefore, **we** the Tennessee Regulatory Authority ("TRA") and the Tennessee Attorney General's Office ("Attorney General"), (collectively referred to herein as "Tennessee") submit these Comments in connection with the Federal Communications Commission's ("FCC" or "Commission") issuance of a national Do-Not-Call registry in accordance with the Telephone Consumer Protection Act of 1991 ("TCPA").

Tennessee applauds the past efforts of Congress and the Commission in the passage and implementation of legislation to protect consumer's individual privacy rights as well as the initiative against abusive and fraudulent telemarketing practices. We also understand and acknowledge the necessity to review and modify the original rules and regulations. Such

[1] FCC 02-250, 17 FCC Rcd 17459 (2002)

modifications have become necessary to effectuate and meet current policy objectives as a result of the increased public concerns of privacy and changes in the marketplace that include new telemarketing technology and methods. We further support the Commission's stated objectives in the NPRM to address the vast technological changes in telemarketing, specific concerns of consumer privacy, and the establishment of a national Do-Not-Call registry.

In these comments we will address the Commission's request for comments concerning: 1) the establishment of a national Do-Not-Call registry and its impact on state Do-Not-Call programs; 2) the need for additional federal regulations of auto dialers, predictive dialers and other prerecorded messaging equipment; and 3) a requirement prohibiting telemarketers from using network facilities or technology that blocks caller identification ("caller ID") information. Of primary importance to Tennessee is the potential adverse impact the proposed national Do-Not-Call registry will have on Tennessee and other states currently operating successful Do-Not-Call programs within their respective states.

## II. Background Information on *the* Tennessee Do *Not* Call Program

In 1999, the Tennessee General Assembly enacted legislation to provide for a state Do-Not-Call registry to be administered by the Tennessee Regulatory Authority. The TRA's program requires telemarketers to annually register with the TRA that also serves as useful tracking and enforcement information regarding the telemarketer and its affiliates. Tennessee law also requires a telemarketer to pay a registration fee of $500.00 which is used to maintain the self-funded Tennessee program in its entirety. Thereafter, the telemarketer is provided a list of all consumer phone numbers that the telemarketers are not permitted to call. Due to the extensive consumer education campaign instituted in Tennessee when this program began and the ease of

registration for consumers, the state Do-Not-Call registry contains almost 800,000 Tennessee telephone subscribers - a success by any standard.

The Comments we now submit to the Commission are based on the three years of experience Tennessee has obtained from the implementation, operation and enforcement of its Do-Not-Call program ("Tennessee Program"). Since 1999, and the successful registration of hundreds of thousands of Tennessee residents, the TRA has investigated approximately 1,789 consumer complaints alleging violations of the Tennessee Do-Not-Call law. The implementation of consumer-friendly registration and complaint procedures, continuous consumer education efforts, and vigorous enforceincnr actions have resulted in enormous strides in reducing the problem of unwanted telephone solicitations in Tennessee. Tennessee's experience in this arena has also been used as **a** resource for many othcr slates who have worked or are working to set up Do-Not-Call programs. The TRA has consulted with several states in the last few months lending its expertise on such issues as computerization of consumer registration, Internet interfacing, enforcement and general administration of a successful Do-Not-Call program

## 111. The National Do-Not-Call Registry and its Potential Impact on Existing State Do-Not-Call Programs

In light of the facts clearly stated above, we reiterate that Tennessee has an established, successful Do-Not-Call program. Because of this success, we feel compelled to file these Comments in an effort to impress upon the Commission the tremendous concern we have for the future of the Tennessee Do-Not-Call registry. Although we support the efforts of the Commission and realize such efforts are being made to improve the protections for consumers across the nation, we respectfully urge the Cornmission to consider the adverse impact that a

mandatory national Do-Not-Call registry will have on the continued viability of the Tennessee Program. We, therefore, request that the Commission affirmatively provide for the interests of Tennessee consumers by allowing states with viable programs to opt out of the federal programs.

The biggest concern in Tennessee with regards to the National Do-Not-Call registry is the potential impact the national registry will have upon the Tennessee program. It would seem to yo without saying that Tennessee would prefer that the establishment of any national Do-Not-Call registry enhance, rather than diminish, the effectiveness of the Tennessee Program and the programs run by other states. It should he clearly understood that the states have not seen a final copy of the national Do-Not-Call program as proposed by the Federal Trade Commission and the Commission and we are not clear whether a national registry will enhance existing state Do-Not-Call programs. As such, it is somewhat difficult lo comment in detail on proposed rules as a whole without the benefit of such details.

At a minimum, we urge the Commission to take steps to insure cooperation and comity between the states and the federal government on this important initiative. Great care should be taken in the establishment of a national Do-Not-Call registry to ensure it does not effect the viability of state programs, particularly in the area of their program funding. We strongly believe that if the Commission enacts rules similar to those proposed by the FTC, the Tennessee program will suffer and eventually he discontinued because it is so heavily reliant on payment by teleniarketers ofregistration fees. Although it does not appear that the proposal for the national registry will expressly preempt state law, ultimately, the effect of a mandatory, national Do-Not-Call registry will likely be to preempt the Tennessee program. As explained, the TRA will not be able to maintain and continue the Tennessee program, if the national Do-Not-Call registry is

established because it will not be able to financially sustain itself. Further, since several states have recently enacted a Do-Not-Call database system and other states are currently considering implementing such a measure, there is a legitimate concern that these states will be adversely impacted if their programs are funded in large part by the collection ofregistration fees from telernarketers.

### A. De Facto Versus De Jure Preemption of State Programs

Tcnnessee would like to emphasize that we appreciate the efforts of both the FTC and the Commission with regards to the creation of a national Do-Not-Call registry. In fact, it should he noted that the Tennessee Attorney General's Office was among the forward-thinking delegation of states that originally petitioned federal agencies several years ago to create a national Do-Not-Call rcgistry prior to enacting its own slate legislation. Since that time, due in part to the succcss of state programs, the Commission has also decided to establish a national program. The Commission's effort to better regulate telemarketing and address consumer concerns is commendable. It is *our* concern, however, that the effect of this well intended effort to create a national Do-Not-Call program will undermine current state programs such as the one operated in Tennessee. It is Tennessee's position that a mandatory, all or nothing approach by the federal government misses a golden opportunity for collaborative and complementary state and federal regulation which ultimately benefits all consumers.

As previously stated, the TRA administers the Tennessee program using primarily the funds obtained from the registration of teleniarketers. Additional money for the Tennessee program is obtained from fines imposed on violators although this amount is relatively small in proportion to the income from the registration fees. We urge the Commission to carefully review

its proposed rules so that telemarketers do not use the proposed national Do-Not-Call registry to circumvent state programs, by circumventing registration and payment of fees of the state programs.

To our knowledge, there is no provision in the NPRM requiring that telemarketers complete state registration (in those states that currently have a Do-Not-Call program) in order to obtain the national registry. Telemarketers would be able to obtain information from the national Do-Nor-Call programs that would otherwise not be available without complying with the registration laws of a particular state. More specifically, there would be no assurance that a telemarketer would pay a state registration fee. As explained above, loss of this registration fee income on a steady basis, will ultimately result in a failure to fund a state Do-Not-Call program that relies on these fees.

It is our understanding that telemarketers buy one national list, either through the FTC or the Commission. Also, we understand that the National Registry provides each telemarketer registrant with the first five (5) area codes at no cost. Since Tennessee has only six (6) area codes, the five (5) free area code allowance would permit a telemarketer to access the national database for Tcnnessee without the need to register with the Tennessee Do-Not-Call Program. What incentive would there be for a telemarketer to pay the five hundred dollar ($500.00) Teiinessec registration fee when the identical Do-Not-Call Registry information can be obtained from the federal government for less than fifty dollars ($50.00)? Essentially, an individual or entity would be able to telemarket Tennessee consumers without paying the registration fee or revealing to Tennessee crucial contact information. Under the five free area code allowance, the registrant would be able to obtain the majority of the Tennessee registry at no cost to that

telemarketer. The telemarketer may potentially be able to avoid compliance with Tcnnessee law indefinitely.

The funding lor state Do-Not-Call programs, such as the registry maintained in Tennessee, would be reduced since telemarketers would register only at the federal level thereby obtaining the majority of the state registry information and avoiding state detection or enforcement. **As** a result of the loss of its primary funding the Tennessee program and potentially other programs like it may ultimately have to be discontinued. We are reluctant to embrace any proposal that allows for circumvention of the state programs and registration fees or a proposal that could result in fewer mechanisms of consumer registration. Such a reduction in regulatory protection for Tcnnessee consumers contrasts sharply with the efficient, decisive and public action of the current Tcnnessee Do-Not-Call programs.

Without a doubt, the proposed national rcgistry will make it easier for telemarketers lo engage in solicitation efforts. Tennessee wishes to emphasize, however, that this is not the locus the Commission should have when promulgating regulations in this area. The proper focus is increased consumer protection rather than increased simplicity for telemarketers. Likewise, a system that overlooks consumer protection for the purpose of providing "one stop" accessibility for telemarketers poses other potential problems for many consumers. Some consumers may not desire their name or telephone infomation tendered to the federal government. Further, since it is our understanding that the proposed registry is to be operated by a private contractor, some consumers may not want an unknown, 3rd party to have access to this infonnation. Although it is arguable that the consumer consented to limited dissemination of personal information when registered at the state level, it cannot be stated with any degree of certainty that the consumer has

knowingly acquiesced to the release of personal information for purposes of establishing the federal list. There is no mechanism discussed under the proposed program to allow for dissenting consumers to "opt-out" of becoining part of the federal registry The NPRM only discusses the "dumping" of the state lists as a whole.

### B. Lapses in the Current Proposed Registry

An additional concern for consumers is how the registration process would work on the federal level. Registration practices would change dramatically. The only proposal that Tcnncssce is currently aware of at the federal level does not include a toll free phone number for consumer registration. Currently in Tennessee, consumers can register with the TRA through toll-frce phone number and through a variety of othcr means such as e-mail and online in a matter of minutes at no cost to consumers.

To our knowledge, there has been no mention of any amounts set aside by the FTC or the Commission for a public education campaign of the proposed national Do-Not-Call program. Tennessee's program has been successful due in large part to the money, lime and resources spent to educate consumers about not only the need for the program but how to use the program and complete its registration process. With no such effort proposed at the federal level for the program, consumer confusion will undoubtedly occur. It appears that the responsibility of "getting-the-word-out" regarding the federal program, will ultimately fall on the States. Again, since no source of funding for such an endeavor having been mentioned, it is unlikely this important aspect of a program will be addressed. We urge the Commission to strongly consider this aspect in the rulemaking process and make budgetary provisions accordingly.

## C. Suggestions For The National Reeistrv And Its Impact on State Do-Not-Call Registries

The Commission should not adopt regulations that preempts state jurisdiction hut rather establish a minimum regulation standard nationwide. Said program should institute a default national Do-Not-Call registry that companies could obtain from the Commission when telemarketing in states that do not have a Do-Not-Call program (referred to as "opt-in states"). A default national registry will not include the names of consumers from the states that operate a state Do-Not-Call program and do not wish to join the national registry. (referred to as "opt-out states"). The Commission would instruct telemarketers to contact the opt-out states for those state Do-Not-Call registries or, at a minimum, advise that state registration is a requirement prior to federal registration.

Tcnnessec further recommends that a long-term partnership between the Commission and all states that have implemented a Do-Not-Call program be established to ensure ongoing cooperation to combat telemarketing abuses. On enforcement issues, the opt-out states would conduct investigations of Do-Not-Call violations within their states and enforce state law. Tennessee Do-Not-Call statutes permit us to enforce all solicitation calls coming into Tennessee. However, there may be situations where some opt-out states will request that Commission to proceed with enforcement actions on some interstate and international telemarketing complaints. Joint investigations could be conducted in these situations and previous experience indicates that these investigations have been accomplished with great success. Such a cooperative model is similar to the partnership that currently exists between the Commission and the states in the enforcement of slamming complaints. The latest statistics on slamming complaints reveal a drop in the number of complaints. Tennessee asserts that a similar approach may be as effective in

this situation as well

Tennessee maintains that swift and effective enforcement actions are required to have a successful enforcement program. Enforcement of Do-Not-Call regulations in Tennessee, for example, differ from the Coinmission's current mode of operation. At present, under Section 503 of the TCPA, the Commission is required, in an enforcement action, to issue a warning citation to any nonlicensee as an initial matter. Only if the non-licensee subsequently engages in conduct described in the citation, *may* the Coinmission propose a forfeiture. The forfeiture may only be issued as lo subsequent violations.[2] Without active and effective enforcement, any Do-Not-Call program will fail. The TRA is responsive and addresses the immediate needs of Tennessee citizens and the TRA processes and investigates each complaint on its own merits with Notices of Alleged Violation letters being sent in the appropriate situations.

In short, since approximately half of the states have taken the initiative and established a Do-Not-Call program, the Commission should distinguish between the states that have and those that do not have established Do-Not-Call programs. The states with existing Do-Not-Call programs should be permitted to opt out of the proposed national Do-Not-Call registry. The Commission's goal should not disrupt existing state Do-Not-Call programs, but build upon their succcss. The Commission's goal of protecting consumers will be secured and telemarketers will have greater continuity with regard to registration requirements. Tennessee adamantly maintains that a "one stop" for telemarketers should not be the Commission's primary perspective.

For those states desiring jurisdiction, the initial layer of government protection, maintenance of a Do-Not-Call state list and enforcement for Do-Not-Call violations would be recognized as

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[2] See 47 U.S.C. §§ 503(b)(5), (b)(2)(C)

being within a state's jurisdiction. The TRA has vast knowledge and experience with the operation of phone systems through regulation of for-profit phone companies. This has enabled the staff at the TRA to use these skills to its distinct advantage in the investigation of Do-Not-Call complaints.

## IV. Automated Calling Systems Use

The Coinmission seeks comment on the use of automated calling systems, such as predictive dialers and answering machine detection systems, and how these technologies may be regulated in order to reduce the number of calls received by consumers. The Commission's NPR raises the need for discussion and resolution of many issues with regard to changes in telemarketing technology. Advances in technology such as caller ID blocking systems, automated calling or predictive dialing systems, and prerecorded message equipment have allowed telemarketers greater "success" in contacting consumers while reducing cost for the telemarketer. Based on these developments in the telemarketing industry, we applaud the Commission's effort to revisit the consumer protection issues surrounding the use of such equipment. Tennessee encourages the Coinmission to look at all aspects of these very technical and complex issues concerning automated dialers, predictive dialers and modems. Further, we encourage the Commission to take this opportunity to identify and treat "the cause" rather than merely treating the "symptoms" of the problems at hand.

The unlawful use of automated dialers, predictive dialers and automated messaging equipment have been a major source of complaints received by the TRA. Many of these devices are presently in use in Tennessee. This equipment is normally designed to either speak to a "live" person and drop the call if an answering machine answers or leave a message on an

answering machine and drop the call if a "live" person answers. The design and method of use of this equipment brings with it numerous problems that are experienced by consumers daily throughout the United Slates. At the FTC's Do-Yot-Call Forum, the Direct Marketing Association ("DMA") discussed the number of outbound telemarketing representatives making 13 calls an hour, 8 hours a day its possible that 104 million calls are made to businesses and consumers each day. The DMA also noted forty-one percent (41%) of these calls may be abandoned calls. This percentage of calls amount to approximately 42,640,000 calls being abandoned daily in the United States. These abandoned calls are often related to busy signals, no answer, hang-ups or answering devices.[3]

While telemarketers are charged with self-regulating their abandonment rates, Tennessee urges the Commission to take a more aggressive approach to this issue. In further exploring the means as to which a zero abandonnicnt rate can be achieved from the premise of these calls being violations per se of the present rules. Telemarketers should he required to increase efficiencies in areas other than their "predictive mode" technologies which now exacerbate thc abandonment problem by creating more of these no answer, hang up calls to consumers. State Do-Not-Call lists that have been enacted are effective regulatory measures that eliminate telemarketers from playing the numbers game of calling "anyone and everyone."

## V. Caller ID

The Commission has accurately surmised the linkage of caller ID service to limiting telemarketing abuses. Caller ID service gives consumers the power to light unwanted telephone

[3] FTC Do-Not-Call Forum Transcript June 6. 2002 at pages 68-69

solicitation calls. This may be a reason why some telemarketers use various tactics to block caller ID service from working properly on the consumer's telephone. Caller ID information provided by consumers has been vital to the successful enforcement efforts by the TRA. Any impediments to the proper function of caller identification equipment and the information they were designed to relay should be aggressively reviewed and addressed. Unfortunately, ihere are numerous consumer accounts of the failure to block calls generated outside the consumer's calling area. Technical excuses offered by some telemarketer for not providing calling information over caller ID service should be addressed one-by-one until solutions are found.

The Commission along with other federal agencies should also consider further investigating the establishment of a minimum standard lor a T-1 grade telephone line service to require the transmission of caller ID information by all carriers. The revised rules would need to require some fonn of line identification of the designated trunk with a given phone number from the calling party, so thai it would show up on the consumer's caller identification equipment. Tennessee believes the Commission is in a strong position to address many of these technical issues and recommends the establishment of minimum, generic technical specifications for type acceptance in the manufacture of basic telephone systems. With these basic equipment standards in place by carriers, similar to the Signaling System 7 (SS7) platform, delivery of caller ID would be transparent regardless of the calls' camcr, origin and destination. This approach addresses the major contributing factor for abusive telemarketing practices and will greatly assist the enforcement agencies involved in these investigations.

Tennessee supports a prohibition on the manufacturing of commercial use PBX equipment or stations that allow for the caller ID block capability. Tennessee further recommends that

caller ID information (telephone number) should be shown for a main PBX number that can be reached during normal business hours for the party originating the call regardless of the actual call originator.

It is Tennessee's position that legitimate telcmarketers will have no problem or issue with placement of caller identification information in the delivery of their calls. Regulations should be passed making attempts to alter or falsify caller ID infonnation a federal violation. A violation of any such regulations should prompt substantial consequences to deter future violations. We request that the Commission address these difficult technical issues head-on to rcducc abusive telemarketing practices and telcmarketing complaints.

Consideration should also be given to addressing these same issues with our foreign economic partners such as Canada. It is well known and acknowledged publicly that Canada is one of tlic major sources for telemarketing abuses being perpetuated on consumers in the United States. Investigations conducted by the TRA have found in some instances, it only takes a ten (IO) *minutc trip* to the local office supply store lo set a telemarketing effort in motion. A person or entity can purchase software/hardware packs generally ranging in cost under $100.00, a simple plug-in to the personal computer, and a phone line and then the person can make thousands of automated telemarketing telephone calls per day. We urge the Commission to give serious consideration to monitoring the sale of this telephone equipment to ensure it is used for the lawful purposes as outlined by law. Software and hardware developers along with any persons selling or installing this equipment for any unlawful purpose, should be held accountable. Additional consideration should also be given to mandatory sales registration requirements with the Commission for the manufacturers, sellers and all other entities using these devices.

## Conclusion

In short, Tennessee agrees with the Commission's overall effort to strengthen consumer protection in the telemarketing arena. However, it is Tennessee's position that the impact of transferring the Do-Not-Call program to the federal level will be significant and could ultimately terminate a state program that is financially supported by payment of state registration fees from telemarketers. State's rights should bc upheld and appropriate action should be undertaken, to the extent possible, to ensure that the proposed legislation is drafted to ensure that the Tennessee Do-Not-Call program, and other state prograni, remain intact. It is essential that all possible action be taken to protect Tennessee's interests by continuing the program at the State level and ensure the continued enforcement against Do-Not-Call violators. Without the state program in Tennessee, the success in protecting the privacy of Tennessee consumers in our state will likely be diminished.

There arc serious operational and enforcement issues between the jurisdictions of the Commission, FTC and the states may arise, if the FTC and the Commission initiates a national Do-Not-Call program. The resolution of such issues may require the combined efforts of the states, Commission and the FTC. Again, Tennessee encourages the Commission to consider regulations that allow states with successful Do-Not-Call registries to opt-out at the national level. In tlie alternative, the Commission is urged, at a minimum, to adopt a registry program that encourages rather than discourages compliance with existing state Do-Not-Call laws. We encourage the Commission to consider the *many* facets of operating a national Do-Not-Call registry and thoroughly consider the desired goals and method before taking on these difficult tasks. We encourage you to carefully review the information at hand to come up with a workable

solution for all parties particularly those states with innovative, aggressive and successful Do-Not-Call programs.

Respecthlly.

PAUL G. SUMMERS
Attorney General
State of Tennessee

Respectfully,

SARA KYLE
Chairman
Tennessee Regulatory Authority